No. 91-7604

In The

Supreme Court of the United States

October Term, 1992

JEFFERY ANTOINE,

Petitioner,

vs.

BYERS & ANDERSON, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed March 11, 1992
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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF
WASHINGTON AT TACOMA

JEFFERY A. ANTOINE, *Petitioner,*

v. No. C88-260TB

BYERS AND ANDERSON, INC., and
SHANNA RUGGENBERG, *Defendants.*

COMPLAINT
Filed July 1, 1988

Now comes Jeffery A. Antoine, pro se, pursuant to 42 U.S.C. 1981, 1983 and 1985, and complains as follows:

1. Jurisdiction founded on the existence of a Federal question and amount in controversy. This action arises under the United States Constitution, Fifth Amendment thereof. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

2. Venue is proper is the Western District of Washington where both defendants are either incorporated, with its principal place of business found therein, or reside.

BACKGROUND

The United States of America, by and though [sic] its agent, United States District Court for the Western District of Washington, Tacoma, entered into a contract, either express or implied, with Byers and Anderson, Incorporated, herein after referred to as B.A.I., a duly chartered and incorporated entity in Tacoma, Washington, at all times pertinent to this action, to reproduce

transcriptions of evidence and testimony received in open court. This contract was consummated on or before September 20, 1985. Shanna Ruggenberg, an agent and employee of B.A.I. was assigned by B.A.I. to perform duties as a "Court Reporter" in the United States District Court, Tacoma and was so employed on or about March 4, 1986, while working in the courtroom of Honorable Jack Tanner. On March 4, 1986, a jury trial was held with Jeffery A. Antoine, the Plaintiff in this action, as the defendant therein. Subsequently, an order was placed with B.A.I. and Ruggenberg to transcribe her notes in preparation of a direct appeal to the United States Court of Appeals for the Ninth Circuit. Ruggenberg, as agent for B.A.I. and B.A.I. individually, have refused to produce said transcripts. Antoine complains as follows:

COUNT ONE:

3. Plaintiff, Jeffery A. Antoine, was the subject or defendant in a jury trial held on March 4, 1986, at which B.A.I. and Ruggenberg were contracted to supply a reporter to transcribe the proceedings, to which Ruggenberg responded.

4. That subsequently, Plaintiff, both personally and through counsel, ordered and purchased a true and accurate copy of a transcript of this jury trial.

5. That as of this date, no transcript has been provided or prepared.

WHEREFORE, Plaintiff demands judgment against Byers and Anderson, Inc. or Shanna Ruggenberg or against both in the sum of 1,000,000.00 and for such further relief as follows:

1. An Order, directing Defendants to perform and fulfill the terms and conditions of the contract with the United States District Court and/or the Plaintiff, to accurately transcribe, prepare and provide Plaintiff with transcript of the proceeding before the Honorable Jack Tanner on March 4, 1986, involving the Plaintiff.

2. For such further relief deemed just and equitable by this Court.

COUNT TWO:

6. Plaintiff affirms and re-states Count One herein.

7. The Defendants are directly responsible for denying Plaintiff his Constitutional right to due process and access to the courts as a result of Defendants willful and reckless refusal to produce a true and accurate transcript of the trial held on or about March 4, 1986, before the Honorable Jack Tanner in Tacoma, Washington.

8. That Defendants have been repeatedly noticed and served demands by the Plaintiff, his counsel and the United States Court of Appeals for the Ninth Circuit, all without heed or production of transcript.

9. Defendants continue to willfully refuse production to which Plaintiff is duly entitled.

WHEREFORE, Plaintiff demands judgment against Byers and Anderson, Inc. or Shanna Ruggenberg or both in the sum of 2,000,000.00 and for such further relief as follows:

1. An Order directing Defendants to transcribe and produce the transcript of the proceedings held before the Honorable Jack Tanner on or about March 4, 1986, which

involved the Plaintiff in this action, within 21 days of entry of this Order and serve said transcript upon the Plaintiff instanter, by certified mail.

2. For such further relief deemed just and equitable by this Court.

15 May, 1988 /s/ _____
Date Jeffery A. Antoine, Plaintiff
(Jurat Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

(Caption Omitted In Printing)

ANSWER OF DEFENDANT SHANNA RUGGENBERG

Filed January 5, 1989

COMES NOW the defendant Shanna Ruggenberg, and for answer to the complaint filed on July 1, 1988, dated May 15, 1988, admits, denies, and alleges as follows:

1. For answer to paragraphs 1 and 2, and paragraph entitled "Background," the allegations are denied because there is insufficient knowledge and information to form a belief as to the truth of the matters asserted therein, but it is understood that answering defendant did act as a court reporter in proceedings involving the plaintiff that took place in the U.S. District Court in Tacoma before Judge Jack E. Tanner.

2. For answer to Count One, paragraphs 3, 4, and 5, the allegations are denied because there is insufficient knowledge and information to form a belief at [sic] to the truth of the matters asserted therein.

3. For answer to paragraphs 6, 7, 8, and 9, the allegations are denied because there is insufficient knowledge and information to form a belief as to the truth of the matters asserted therein.

4. Answering defendant denies all other allegations contained in plaintiff's Complaint which are not specifically referred to in this Answer.

FOR FURTHER ANSWER AND AFFIRMATIVE DEFENSE, the defendant Shanna Ruggenberg alleges as follows:

5. That if the plaintiff was damaged as in his Complaint set forth or in any manner whatsoever, the same was proximately caused or contributed to by his own careless and negligent acts and/or risks which he assumed and to which he voluntarily exposed himself.

6. That plaintiff's Complaint fails to state a claim upon which relief can be granted against this answering defendant.

7. Answering defendant reserves the right to assert and add affirmative defenses, additional party defendants, cross claims, and/or counterclaims as additional discovery may warrant.

WHEREFORE, the defendant Shanna Ruggenberg prays for judgment as follows:

1. Dismissing the Complaint of plaintiff with prejudice, without recovery, and with the award to the defendant Ruggenberg of costs and disbursements incurred.

2. For such other and further relief as to the Court may deem just and equitable.

DATED this 5th day of January, 1989.

BETTS, PATTERSON & MINES, P.S.

By _____
William P. Fite
Attorneys for Defendant
Shanna Ruggenberg

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

(Caption Omitted In Printing)

DECLARATION OF MARY BYERS JONES

Filed April 5, 1989

I, Mary Byers Jones, declare as follows:

1. Jennifer Anderson and I are 50 percent shareholders in the corporation of Byers & Anderson, Inc., and have been since its incorporation in 1984. Byers & Anderson, Inc. is a Tacoma court reporting firm.

2. As is the custom with court reporting firms in the area, Byers & Anderson, Inc. contracts with court reporters to provide court reporting services to parties who contact Byers & Anderson, Inc. These court reporters are considered independent contractors rather than employees. The reporter's compensation is determined by the money collected for the individual reporter's services, minus a commission retained by Byers & Anderson, Inc. Byers & Anderson, Inc. does not withhold federal income tax or Social Security tax from the reporter's compensation, which would be required if the reporter was an employee. Byers & Anderson, Inc. was audited by the Internal Revenue Service in 1986. Following that audit, Byers & Anderson, Inc. was not required to pay employee taxes for the independent reporters (including Shanna Ruggenberg).

3. Since Byers & Anderson, Inc. is a successful business, Jennifer Anderson and I are always looking for skilled new court reporters. When we contacted Bates Vocational School in 1984, Shanna Ruggenberg was highly recommended.

4. On or about July of 1984, Byers & Anderson, Inc. contracted with Shanna Ruggenberg to begin court reporting through Byers & Anderson, Inc. As is the case with all court reporters who begin working through Byers & Anderson, Inc., Shanna Ruggenberg was initially required to complete a six month probationary period during which each of her transcripts were read by Jennifer Anderson or myself for accuracy. Shanna Ruggenberg's work was of high quality, and she successfully completed the six month probationary period. Shanna Ruggenberg had provided court reporting services through Byers & Anderson, Inc. for approximately one and one-half years without incident before she began reporting in Judge Tanner's courtroom in 1986.

5. On or about January of 1986, Byers & Anderson, Inc. was contacted by the federal district court in Tacoma, and was asked to provide a court reporter for Judge Tanner's court on an emergency relief basis. It was unusual for Byers & Anderson, Inc. to receive such a request from the Tacoma federal court. Jennifer Anderson and I presented the option of working for the federal court to the court reporters who worked through Byers & Anderson, Inc. and who are not then too busy. At no time did Jennifer Anderson or I instruct Shanna Ruggenberg to accept the temporary court reporting position in Judge Tanner's court. She was presented with the option and she chose to accept it.

6. Judge Tanner's court personell [sic] requested that Shanna Ruggenberg continue to provide court reporting services to the court longer than we had originally anticipated. Soon, the court ceased contacting Shanna

Ruggenberg through Byers & Anderson, Inc., and began to contact her directly.

7. Byers & Anderson, Inc. did not provide court reporting equipment or a work place for Shanna Ruggenberg. The court had complete control over the nature of her work, her hours, and her working conditions. Any transcript that was ordered from Shanna Ruggenberg, whether she was in court or on deposition, was produced according to her own schedule, on her own computer which she kept at home. Byers & Anderson, Inc. did not even knew when or if court transcripts were being ordered from Shanna Ruggenberg while she was working for the federal district court in 1986.

8. Shanna Ruggenberg formally severed her relationship with Byers & Anderson, Inc. in November of 1986, long before she filed an affidavit in court indicating that she had lost her notes and tapes necessary to complete the trial transcript of *U.S. v. Antoine*. A true and accurate copy of her letter of resignation is attached to this declaration as Exhibit 1.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on April 3, 1989, at Tacoma, Washington.

/s/ Mary Byers Jones
Mary Byers Jones

Exhibit 1

11/10/86

BYERS & ANDERSON, INC.
110 South 9th, Suite 301
Tacoma, Washington 98402

ATTENTION: Jenny Anderson & Mary Byers-Jones.

SUBJECT: Letter of Resignation.

Dear Jenny & Mary,

After serious consideration, I have reached a definite decision to resign from the company, effective November 29, 1986. You will readily understand my decision in view of my backlog and personal financial obligations.

My two-and-a-half years with Byers & Anderson have provided me with a great amount of experience and a stimulating challenge, but at the present time my backlog and past due 1984 and 1985 invoices, which I have requested payment, has created a negative cash flow. I feel that these invoices are seriously past due and should have been taken care of a long time ago.

I enjoy the court reporting field and the people I have met in this field, and I regret very much the necessity of leaving because of extreme personal and financial pressures.

Sincerely,

/s/

Shanna R. Ruggenberg

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

(Caption Omitted In Printing)

DECLARATION OF JENNIFER L. ANDERSON

Filed May 1, 1989

I, Jennifer L. Anderson, declare as follows:

I am one of the 50 per cent shareholders of Byers & Anderson, Inc., a Tacoma court reporting firm and a defendant in the above-referenced lawsuit.

On or about January of 1986, Byers & Anderson, Inc. was contacted by the federal district court in Tacoma, and was asked to provide a court reporter for Judge Tanner's court on an emergency relief basis. Mary Byers Jones and I presented the option of working for the court to Shanna Ruggenberg, who chose to accept the option.

The financial compensation paid by the court for Ruggenberg's services was not negotiated, but was determined by the court. At the time Shanna Ruggenberg agreed to perform court reporting services for the court, no fees or arrangements for transcripts were negotiated with Byers & Anderson, Inc.

Byers & Anderson, Inc. was not advised that Shanna Ruggenberg was reporting the criminal trial of Mr. Antoine on March 3-4, 1986 and was not notified when Mr. Antoine ordered a transcript. The receipt copy attached as Exhibit 2 to the affidavit of Jeffrey Antoine is not a Byers & Anderson, Inc. receipt and Byers & Anderson, Inc. did not receive any portion of the $700 purportedly paid Shanna Ruggenberg for the Antoine transcript. I had

never heard of Jeffrey Antoine until after Shanna Ruggenberg severed her association with Byers & Anderson, Inc.

I declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

Executed on the 17th day of April, 1989, at Tacoma, Washington.

/s/
Jennifer L. Anderson

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

(Caption Omitted In Printing)

DECLARATION OF COUNSEL RE EXCERPTS FROM RUGGENBERG DEPOSITION (EXHIBIT 1 TO MOTION TO RECONSIDER DENIAL OF DEFENDANT BYERS & ANDERSON, INC.'S MOTION FOR SUMMARY JUDGMENT ON INDEPENDENT CONTRACTOR ISSUE)

Filed May 31, 1989

I, TYNA EK, declare as follows:

I am counsel for Byers & Anderson, Inc. in the above-referenced action, and in a Pierce County Superior Court action entitled *Scott v. Byers & Anderson, Inc., et al.*, Pierce County Cause No. 88-2-09876-5. Shanna Ruggenberg is a co-defendant in the Scott action which stems from the delay in production of a transcript reported by Shanna Ruggenberg in a civil action that was before The Honorable Jack Tanner in U.S. District Court in 1986 while Shanna Ruggenberg was serving as temporary court reporter for that court. The following are true and accurate excerpts from the deposition of Shanna Ruggenberg taken on May 19, 1989 in the *Scott* case.

Q. (By Mr. Burroughs) But in your mind you didn't think whether you were an employee or an independent contractor? Was there a distinction in your mind?

A. I didn't really think about it. I knew I paid my own taxes. I was an independent contractor.

Q. A what?

A. An independent contractor, I guess, working through Byers & Anderson.

Q. That was your understanding?

A. Yes.

* * *

[By Tyna Ek] And when you first started to work through Byers & Anderson, I'm assuming they explained to you the arrangements as far as the percentages and how much money they would take as commission, et cetera?

A. Yes.

Q. And that was at the very onset, correct?

A. Yes.

Q. And didn't they also at that time tell you, in fact, in those words, that you were an independent contractor?

A. I believe that was mentioned.

Q. And they told you you would have to get your own B&O tax number, and all of that?

A. Yes.

* * *

[By Ms. Ek] And were any employee taxes taken out from the money that you received for your work?

A. No.

Q. And all of the equipment you used, whether it was in a deposition or in your court assignments or the hearing, did any of that equipment belong to Byers & Anderson?

A. No.

Q. And that was all your own equipment?

A. Yes.

Q. And you mentioned the Baron computer that you bought. Did you purchase that yourself?

A. Yes.

Q. And before you used computer services, you transcribed how?

A. Typewriter.

Q. And the typewriter was owned by you?

A. Yes.

Q. And that was done in your home?

A. Yes.

Deposition of Shanna Ruggenberg, p. 185, l. 23 – p. 186, l. 7, p. 208, l. 4 – l. 17, p. 209, l. 2 – l. 21.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of May, 1989 at Seattle, Washington.

/s/
Tyna Ek

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
OFFICE OF THE CLERK

August 12, 1987

BRUCE RIFKIN
CLERK

308 U.S. COURTHOUSE
SEATTLE, WASHINGTON 98104

Mr. Randall M. Johnson
Anderson, Caraher, Brown & Burns
4041 Ruston Way
Tacoma, Washington 98402

Dear Mr. Johnson:

This letter is in response to your questions of me regarding Shanna Ruggenberg's court reporting services to Judge Tanner.

Pursuant to 28 U.S.C. § 753(g) and Chapter 11, Section G.1. of the *Guide to Judicial Policies and Procedures*, Court Reporters Manual, the District Court contracted on an emergency basis with Byers and Anderson, Inc. These emergency services began February 6, 1986, and ended August 8, 1986. As provided for in emergency situations, normal contractual procedures were dispensed with and no formal contract was executed. Section G.1. is part of Section 28 U.S.C. § 753(g) which allows for a standing contract to exist to cover foreseeable excess court reporting needs. The emergency provision exists to cover circumstances when the standing contract has expired or otherwise does not exist.

The Court's emergency needs were precipitated here by the release of an Official Court Reporter from his employment as a reporter serving Judge Tanner in Tacoma. When this situation arose, the Court adopted the

emergency provisions of Section G.1. There was no standing contract which could otherwise have met this need because no firm had responded when the formal solicitation had been let the year before. On January 8, 1986, the Court again began the formal process of open solicitation for contractual court reporting services in Tacoma.

In this emergency, Byers and Anderson billed the Court directly for its services and was paid directly. As is customary when using a reporting firm, the reporter sent by the firm on any given day becomes the contact for communicating reporting needs for subsequent days. As is also customary, reporting firms and judicial officers express preferences for continuity in service. Despite this desire for continuity, the Court had no authority and exercised no authority to limit which particular reporter from Byers and Anderson provided needed emergency reporting services. Byers and Anderson, for that matter, had no continuing obligation to provide reporting services. As in such contracting situations, supervision of the individual reporter was left to Byers and Anderson and not the United States District Court.

My office also became directly involved with Ms. Ruggenberg upon her expression of interest in the position of Official Court Reporter which was advertised on March 18, 1986. Upon receipt of Ms. Ruggenberg's resume (enclosed), it was discovered that she could not be considered for the position of Official Court Reporter without qualifying by testing for listing on the registry of professional reporters of the National Shorthand Reporters Association or passing an equivalent qualifying

examination. The Court agreed to consider Ms. Ruggenberg's application if she succeeded in passing a recognized State qualifying examination. Ms. Ruggenberg decided to take the next available State test, offered in Idaho on May 3, 1986. Ms. Ruggenberg did not successfully complete this test.

In the meantime, the solicitation process begun in January 1986 materialized into a formal contract with a reporting firm. This contract was executed by the Administrative Office of the U.S. Courts to begin August 11, 1986. As a result, the services of Byers and Anderson, Inc., were no longer required.

As you requested, I have enclosed a copy of the Court's Plan for the Effective Utilization of Court Reporters. In doing so, I hop[illegible] that it will not confuse the fact that Byers and Anderson, Inc., was an emergency contracting firm. Neither they nor Shanna Ruggenberg as their agent became an official substitute reporter or temporary reporter. Ms. Ruggenberg was an employee of an independent contracting court reporting firm.

If I can provide further information bearing on the Court's use of the Byers and Anderson, Inc., court reporting firm, please let me know.

Very truly yours,

Bruce Rifkin, Clerk

Enclosures

cc: Susan Barnes
Assistant United States Attorney
bcc: Jon Leeth w/orders
Judge Tanner w/Johnson's letter

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff/Appellee,*

v. No. 86-3073

JEFFERY ANTOINE, *Defendant/Appellant.*

ORDER

Entered June 11, 1988

Before: SNEED, Circuit Judge

On April 28, 1988, this court ordered Court Reporter Shanna Ruggenberg to file, within 7 days, either the outstanding transcripts for this case or a motion for extension of time. Court Reporter Ruggenberg was also ordered to show cause why she should not be sanctioned for failure to comply with the transcript due date set earlier. To date, Court Reporter Ruggenberg has failed to comply with the order or communicate with this court.

Within 7 days of the date of this order, Ms. Ruggenberg shall either file the transcripts for March 3, 4, and 11, 1986, or shall turn over her notes for those days to her attorney, Randall M. Johnson, and notify this court that she has done so.

If Ms. Ruggenberg cannot locate her notes for those days, she shall submit an affidavit to that effect to this court within 7 days of entry of this order.

If Ms. Ruggenberg fails to comply with this order, sanctions may be imposed without further warning.

The clerk will serve a copy of this order on the court reporter monitor; the district court judge; Court Reporter

Shanna Ruggenberg at 904 118th Avenue Court East, Puyallup, WA 98371; and Ms. Ruggenberg's attorney Randall M. Johnson, Esq. at 4041 Ruston Way, Tacoma, WA 98402.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

(Caption Omitted In Printing)

AFFIDAVIT OF SHANNA RUGGENBERG

STATE OF WASHINGTON)
) ss.
COUNTY OF Pierce)

SHANNA RUGGENBERG, being first duly sworn on oath, deposes and says:

That I am unable to locate the notes and tapes for the remaining portion of the transcript of proceedings in this action. I have previously filed with the above court some of the transcripts, which were transcribed from notes and tapes that I did have for this action. This transcription is approximately 58 pages.

/s/
SHANNA RUGGENBERG

SUBSCRIBED AND SWORN TO before me this 11th day of July, 1988.

/s/Cathy Sala
NOTARY PUBLIC in and for the State of Washington, residing at Tacoma.
My commission expires: 3/9/92.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEFFERY A. ANTOINE, *Petitioner,*

v. No. C88-260TB

BYERS AND ANDERSON, INC., and
SHANNA RUGGENBERG, *Defendants.*

ORDER (1) GRANTING DEFENDANTS' MOTION FOR JUDGMENT; (2) DENYING PLAINTIFF'S MOTIONS FOR LEAVE TO FILE AMENDED COMPLAINT; AND (3) ORDER OF DISMISSAL

Entered February 16, 1990

THIS MATTER comes before the court on Defendant Ruggenberg's Motion for Summary Judgment of Dismissal; Defendant Byers & Anderson's Motion for Summary Judgment; Plaintiff's Motion For Leave to File Amended Complaint; and Plaintiff's Motion for Leave to File Second Amended Complaint. The court has reviewed the pleadings filed in support of and in opposition to these motions, the file herein, and heard oral argument of counsel on 2 February 1990.

Under Fed. R. Civ. R. 56(c), the entry of summary judgment is mandated when the evidence in the record shows no genuine issue of material fact. *T. W. Elec. Service v. Pacific Elec. Contractors,* 809 F.2d 626 (9th Cir. 1987); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1985). A motion for summary judgment must be granted against a nonmoving party who fails to prove an essential element of the claim. A genuine dispute over a material fact exists if the evidence is such that a reasonable jury could return a

verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Court must also consider the substantive evidentiary burden that the nonmoving party must meet at trial. *T. W. Elec. Service v. Pacific Elec. Contractor, supra* at 632.

FACTUAL BACKGROUND

The plaintiff was charged with the offense of bank robbery and a two-day jury trial was held in March, 1986 before U.S. District court Judge Jack E. Tanner. Mr. Antoine was convicted, sentenced and incarcerated. He promptly appealed his sentence and conviction. On March 20, 1986, he ordered the transcript of the proceedings from defendant Ruggenberg, and made a deposit of $700.

Thereafter began a series of delays in securing a transcript. On March 4, 1988 the U.S. Court of Appeals for the Ninth Circuit ("9th Circuit") ordered that the transcript was due on April 8, 1988. A partial transcript of 58 pages was filed on June 1, 1988. Other orders from the 9th Circuit requiring the production of the remaining transcript or an explanation of the delays were ignored by Ms. Ruggenberg. Ultimately, it was learned she had lost her notes of the trial. Ms. Ruggenberg was fined and arrested as part of the 9th Circuit's efforts to obtain this and other transcripts.

On August 29, 1988 the 9th Circuit ordered the parties to reconstruct the record pursuant to Fed. R. App. P. 10(c). Both parties submitted materials, which were filed in January 1989. In April 1989, reporter notes were delivered by Ms. Ruggenberg's counsel to the court and a

transcript was produced by another reporter. Mr. Antoine's trial record and transcript has now been certified to the 9th Circuit and a briefing schedule is set for his appeal. Mr. Antoine, in his original complaint, sought specific performance of the contract to produce a transcript of this trial, for which he paid $700, damages for breach of contract, and damages for claimed violations of his constitutional rights to due process and access to the courts pursuant to 42 U.S.C. § 1983.

DISCUSSION

Quasi-judicial immunity is derived from the well-accepted common law doctrine of absolute immunity accorded judges. *Imbler v. Pactman*, 424 U.S. 409 (1976). The Ninth Circuit has clearly stated that court reporters have quasi-judicial immunity. *Stewart v. Minnick*, 409 F.2d 826 (9th Cir. 1969). That court has consistently recognized immunity for quasi-judicial officers when they perform tasks that are an "integral part of the judicial process." *Mullis v. United States Bankruptcy Ct.*, 828 F.2d 1385, 1390 (9th Cir. 1987) (citing *Morrison v. Jones*, 607 F.2d 1269, 1273 (9th Cir. 1979), *cert. denied*, 445 U.S. 962, 100 S. Ct. 1648, 64 L.Ed.2d 237 (1980); *Ship v. Todd*, 568 F.2d 133, 134 (9th Cir. 1978); *Stewart*, 409 F.2d 826). In *Mullis*, the court reasoned that the acts committed by bankruptcy clerks in filing a complaint or petition is a basic and integral part of the judicial process and consequently the clerks qualify for quasi-judicial immunity. 828 F.2d at 1390. In that case, the clerks allegedly failed to carry out their duties. The court concluded that since the acts were within the " 'general subject matter jurisdiction' of the bankruptcy clerks" that the clerks had absolute immunity. The court explained

that a "mistake or an act in excess of jurisdiction does not abrogate judicial immunity, even if it results in 'grave procedural errors'." *Id.* (quoting *Stump v. Sparkman*, 435 U.S. 349, 359, 98 S. Ct. 1099, 1106, 55 L.Ed.2d 331 (1978). The same reasoning would appear to apply to court reporters. *See, Stewart*, 409 F.2d at 826.

However, a recent U.S. Supreme Court decision draws a clear distinction between administrative and judicial functions as they pertain to the immunity of a judge. *Forrester v. White*, 484 U.S. 219 (1988). In *Forrester*, a judge was denied judicial immunity for the "administrative" act of discharging an employee, even though the Court recognized that such decisions were essential to the very functioning of the courts. The Court was emphatic in its conclusion that it is the nature of the function performed that determines whether judicial immunity attaches. Consequently, the 9th Circuit decisions that hold that even ministerial acts are protected under quasi-judicial immunity may have been overruled by the *Forrester* decision. *See, e g., Morrison v. Jones*, 607 F.2d 1269 (9th Cir. 1978) (performance of a ministerial duty clothed with quasi-judicial immunity). At least, the Ninth Circuit cases must be examined carefully with *Forrester* in mind.

Under the pre-*Forrester* Ninth Circuit analysis, the court reporter would have absolute immunity for two reasons: first, the court reporting function is an integral part of the judicial process; and second, the court reporter, in producing a transcript, was acting within her official capacity as a quasi-judicial officer. Therefore, even though her acts and omissions may, in fact, have been inconsistent with her responsibilities, she is nevertheless

absolutely immune from a civil damage suit. *See, Mullis*, 828 F.2d at 1385.

This result is not altered by the *Forester* decision. Although the U.S. Supreme Court made a clear statement that administrative decisions (even when made by a judge) are not protected, the Court did not say that a task, merely because it can be described as administrative, places it outside the ambit of judicial functions. Obviously, judges perform a number of administrative tasks that are part of the judicial function. *Forrester* does not limit the doctrine of absolute immunity by excluding any act that could be described as administrative without regard to its relationship to the judicial process. It is the relationship of the act to the judicial function that is crucial under *Forrester*.

Critical to the *Forrester* analysis is the question of whether there are adequate remedies available to litigants through ordinary judicial mechanisms. For example, in some situations, where a significant portion of the record is absent, courts have found reversible error. *See, United States v. Selva*, 559 F.2d 1303 (5th Cir. 1985). In other situations, it is appropriate to vacate a judgment and remand the case for a hearing to determine whether the appellant was prejudiced by the lack of a complete record. *See, Brown v. United States*, 314 F.2d 293 (9th Cir. 1963); *United States v. Piascik*, 559 F.2d 545 (9th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978). Moreover, the appellate rules provide for relief in situations where a transcript is not produced. Fed. R. App. P. 10(c), 11(b). Under Rule 10(c), the "appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." Under Rule 11(b),

the Court of Appeals has the authority and discretion to provide whatever relief might be appropriate through the judicial process. In the situation before the court, unlike the employee fired by the judge in *Forrester*, appellant has remedies available through the judicial process. Consequently, the act or omission that gives rise to such a judicial remedy is properly described as judicial as opposed to administrative.

Finally, one could argue that granting immunity to a court reporter does not operate to protect the decision-making aspect of the judicial function, but instead protects the ministerial aspects of a court reporter's job. *See, e.g., McLallen v. Henderson*, 492 F.2d 1298 (8th Cir. 1974). In *McLallen*, the court explained that the purpose of quasi-judicial immunity is to protect "non-judicial officials who, like judges, must not be unduly inhibited to exercise discretionary authority by the constant fear of personal liability for damages." *Id.* at 1300. The court reasoned that, since court reporters function in a ministerial capacity, they should not be protected by quasi-judicial immunity. However, neither *Forrester* nor the 9th Circuit have adopted such a narrow view of quasi-judicial immunity.

Defendant Ruggenberg's acts and omissions were within her official capacity as a quasi-judicial officer. Preparing a transcript is clearly part of the court reporter's job responsibilities, is an integral part of the judicial process, and is part of the judicial function. Therefore, even if the record supports the allegations that Ms. Ruggenberg's acts were improper, or even malicious, it would not abrogate her immunity. *See, Mullis*, 828 F.2d at 1388 (citing *Stump*, 435 U.S. at 356-57, 98 S. Ct. 1099, 1104-05). Her Acts are absolutely immune from a civil damage suit.

Mr. Antoine has received the relief provided by the judicial process in that the record was reconstructed pursuant to the Federal Rules of Appellate Procedure, and he finally obtained a copy of his trial transcript. His trial record of his criminal case has been certified for appeal and it will be considered in due course by the 9th Circuit. To this extent, he has not been denied due process or access to the courts. Any damage he has suffered as a result of the delay is prospective and speculative and will not become evident until, and unless, his conviction is reversed on appeal.

Finally, the question of whether Byers & Anderson could be held liable, even though Ms. Ruggenberg has immunity, must be answered in the negative. A principal's liability is solely vicarious. *Brink v. Martin*, 50 Wn.2d 256 (1957) (citations omitted). Thus, because the agent (Defendant Ruggenberg) is not liable, Byers & Anderson, as principal, is also free of liability.

Therefore, for the foregoing reasons, defendants' motion to dismiss should be granted and plaintiff's claims under 42 U.S.C. § 1983 should be dismissed.

The remaining claim in the original complaint (breach of contract) is based on state law. State law claims may be considered by a federal court on the exercise of pendant jurisdiction over those claims, whenever the federal and state claims "derive from a common nucleus of operative fact." *Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The plaintiff has filed two motions to amend his complaint to add further state law claims. The first

motion seeks to add the claims of gross negligence, common law negligence, negligent hiring and breach of contract against both defendants. The second motion seeks to add the claim of violation of the Washington State Consumer Protection Act against both defendants.

The jurisdictional basis for filing the original complaint in federal court was the federal question raised under 42 U.S.C. § 1983. In light of the foregoing opinion that the § 1983 claim should be dismissed, the remaining case consists of only state law claims. Under the analysis of the *Gibbs* decision and *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), the case properly belongs in state court. Therefore, the court should dismiss the state law claims, with leave to refile in state court before entry of an order of dismissal of the state claims. Plaintiff's motions to amend his complaint should therefore be denied in this court.

Therefore, for the above stated reasons, it is hereby

ORDERED that Defendants Byers & Anderson and Ruggenberg's Motions for Summary Judgment on the issue of quasi-judicial immunity are GRANTED and plaintiff's claim pursuant to 42 U.S.C. § 1983 is hereby DISMISSED; and it is further

ORDERED that plaintiff's state law claim of breach of contract is hereby DISMISSED WITHOUT PREJUDICE effective 16 March 1990. Plaintiff may file the pendent claim in state court, and the effective date of this Order is therefore delayed until 16 March 1990 to facilitate such filing; and it is further

ORDERED that plaintiff's motion for leave to file amended complaint and plaintiff's motion for leave to file second amended complaint are DENIED without prejudice to filing in a state court; and it is further

ORDERED that the Clerk of the Court shall enter a judgment of dismissal of this case on March 16, 1990.

The Clerk of the Court is instructed to send uncertified copies of this Order to plaintiff at his last known address and to all counsel of record.

DATED this 16th day of February, 1990.

/s/ Robert J. Bryan
Robert J. Bryan
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON
Transcript Designation and Ordering Form

U.S. Court of Appeals Case No. _____

U.S. District Court Case No. CR85-87T

Short Case Title USA vs. ANTOINE

Date Notice of Appeals Filed by
Clerk of District Court April 18, 1986

SECTION A -
To be completed by party ordering transcript
HEARING DATE: 3/4/86
COURT REPORTER: Ruggenberg
PROCEEDINGS: Voir Dire

* * *

(attach additional page for designations if necessary)

( ) I do not intend to designate any portion of the trascript and will notify all counsel of this intention.

( ) As retained counsel (or litigent proceeding in pro per), I request a copy of the transcript and guarantee payment to the reporter of the cost thereof upon demand. I further agree to pay for work done prior to cancellation of this order.

(X) As appointed counsel I certify that an appropriate order authorizing preparation of the transcript at the expense of the United Stats has been, or within 5 days hereof will be, obtained and delivered to the reporter. I agree to recommend payment for work done prior to cancellation of this order.

Date transcript ordered May 1, 1986

Estimated date of completion of transcript _____

Signature of Attorney _____

Phone Number (206) 851-2323

Address: 7512 Stanich Court, Gig Harbor, Washington 98335

This form is divided into five parts. It should be used to comply with the Federal Rules of Appellate Procedure and the Local Rules of the U.S. Court of Appeals for the Ninth Circuit regarding the designation and ordering of court reporters' transcripts.

Please note the specific instructions below. If there are further questions, contact the Clerk's Office, U.S. Court of Appeals for the Ninth Circuit at (415) 556-8011

SPECIFIC INSTRUCTIONS FOR ATTORNEYS

(1) Pick up form from district court clerk's office when filing the notice of appeal.

(2) Complete Section A, place additional designations on blank paper if needed.

(3) Send Copy 1 to District Court.

(4) Send Copy 4 to opposing counsel. Make additional photocopies if necessary.

(5) Send Copies 2 and 3 to court reporter. Contact court reporter to make further arrangements for payment.

(6) Continue to monitor progress of transcript preparation.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON
Transcript Designation and Ordering Form

U.S. Court of Appeals Case No. _____

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HEARING DATE: 3/3/86
COURT REPORTER: Ruggenberg
PROCEEDINGS: Opening Statements

HEARING DATE: 3/3-4/86
COURT REPORTER: Ruggenberg
PROCEEDINGS: Settlement Instructions

HEARING DATE: 3/4/86
COURT REPORTER: Ruggenberg
PROCEEDINGS: Closing Arguments

HEARING DATE: 3/4/86
COURT REPORTER: Ruggenberg
PROCEEDINGS: Jury Instructions

COURT REPORTER: See attached sheet
PROCEEDINGS: Pre-Trial Proceedings

COURT REPORTER: See attached sheet
PROCEEDINGS: Other (please specify)

(attach additional page for designations if necessary)

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(X) As appointed counsel I certify that an appropriate order authorizing preparation of the transcript at the expense of the United States has been, or within 5 days hereof will be, obtained and delivered to the reporter. I agree to recommend payment for work done prior to cancellation of this order.

Date transcript ordered December 24, 1987 and March 1, 1988

Estimated date of completion of transcript
UNKNOWN

Signature of Attorney _____

Phone Number (206) 385-1544

Address: 1535 Jefferson Street, Port Townsend, Washington 98366

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON
Transcript Designation and Ordering Form

U.S. Court of Appeals Case No. _____

U.S. District Court Case No. CR85-87T

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COURT REPORTER: See attached sheet
PROCEEDINGS: Pre-Trial Proceedings

COURT REPORTER: See attached sheet
PROCEEDINGS: Other (please specify)

(attach additional page for designations if necessary)

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Date transcript ordered December 24, 1987 and March 1, 1988

Estimated date of completion of transcript
UNKNOWN

Signature of Attorney _____

Phone Number (206) 385-1544

Address: 1535 Jefferson Street, Port Townsend, Washington 98366

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff/Appellee,*

v. No. 86-3073

JEFFERY ANTOINE, *Defendant/Appellant.*

ORDER
Entered April 28, 1988

The reporter's transcripts for this case were due April 4, 1988. The district court informs this court that transcripts for March 3, and April 11, 1986, are still outstanding. Within 7 days of entry of this order, court reporter Shanna Ruggenberg will either (1) file the transcripts, or (2) submit a motion for extension of time, and shall show cause why she should not be sanctioned for failure to comply with this court's March 4, 1988 order.

This order does not waive the mandatory fee reduction for any portion of the transcripts delivered late. *See* Report of the Proceedings of the Judicial Conference of the United States, March 1982, page 10.

A copy of this order will be served on the court reporter monitor; the district court judge; Court Reporter Shanna Ruggenberg at 904 118th Avenue Court East, Puyallup, WA 98371; and Ms. Ruggenberg's attorney Randall M. Johnson, Esq., at 4041 Ruston Way, Tacoma, WA 98402.

This order is subject to reconsideration by a judge if any objection is filed within ten (10) days of the entry of the order.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

/s/ Miriam Mueller
Miriam L. Mueller
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Caption Omitted in Printing)

ORDER

Entered June 14, 1988

Before: SNEED, Circuit Judge

On April 28, 1988, this court ordered Court Reporter Shanna Ruggenberg to file, within 7 days, either the outstanding transcripts for this case or a motion for extension of time. Court Reporter Ruggenberg was also ordered to show cause why she should not be sanctioned for failure to comply with the transcript due date set earlier. To date, Court Reporter Ruggenberg has failed to comply with the order or communicate with this court.

Within 7 days of the date of this order, Ms. Ruggenberg shall either file the transcripts for March 3, 4, and 11, 1986, or shall turn over her notes for those days to her attorney, Randall M. Johnson, and notify this court that she has done so.

If Ms. Ruggenberg cannot locate her notes for those days, she shall submit an affidavit to that effect to this court within 7 days of entry of this order.

If Ms. Ruggenberg fails to comply with this order, sanctions may be imposed without further warning.

The clerk will serve a copy of this order on the court reporter monitor; the district court judge; Court Reporter Shanna Ruggenberg at 904 118th Avenue Court East, Puyallup, WA 98371; and Ms. Ruggenberg's attorney Randall M. Johnson, Esq. at 4041 Ruston Way, Tacoma, WA 98402.

LARSEN, SMITH & ASSOCIATES

COURT REPORTERS

May 30, 1989

Office of Clerk
United States District Court
ATTN: Shirley
308 U.S. Courthouse
Seattle, WA 98104

Re: U.S.A. v. Jeffrey Antoine, CR 85-87T

Dear Shirley:

Enclosed is the original of the above trial transcript. I am sending copies to David Skeen and Gene Wilson with copies of this letter. I am keeping the transcript stored in our computer system in case there are corrections or additions to be made by agreement of counsel.

In order to produce the transcript, I rewrote it for our computer by listening to the audio tapes while watching Shanna's stenotype notes. I indicate at the left margin "(Audio tape on.)" where the tape starts and "(Audio tape off.)" where it was turned off. If the tape was inaudible and there was no help in the notes, I indicated, "(inaudible)." Where there was no tape and I could not read the notes, I indicated, "(unreadable)."

I am aware that in places where I have had to rely on just the written notes that the transcript does not make sense and the speakers are not properly identified. I felt the best I could do would be to give you what was there and hope you could fill in the blanks.

I am also returning to you today the notes and tapes of this trial. Please notify me by September 30 if there are to

be any corrections or additions so that we can clear our computer.

Very truly yours,

Karen L. Larsen, RPR

Encl
cc: David E. Wilson
David Skeen

Karen L. Larsen, RPR • Sharon M. Smith, RPR
Michelle E. Sexton, RPR • Robbie K. McCartney, RPR
Keri A. Aspelund, RPR
Peggy Prichard,RPR, CM Peggy M. Pritschy
Dolores A. Rawlins, RPR
Kathleen J. Cassity, RPR, CM

1800 SEATTLE TOWER • SEATTLE, WASHINGTON
98101 • TELEPHONE (206) 623-6717

LARSEN, SMITH & ASSOCIATES

COURT REPORTERS

July 11, 1989

Mr. David Skeen
Attorney at Law
1535 Jefferson Street
Pt. Townsend, WA 98368

Re: U.S.A. v. Antoine

Dear Mr. Skeen:

At your request I am enclosing two ASCII disks of the above trial transcript.

The letter sent to you with the transcript copy is the best explanation I can give you of the way the transcript was produced. Shanna's notes from the trial were not adequate by themselves to produce a complete transcript, and where she was not using a tape recorder I cannot vouch for the completeness of accuracy of the transcript or speaker identification.

Where I had cassette tapes to work with, I feel the transcript is quite complete. Any inaudibles appearing are indicating whatever is missing is very short. Sometimes Shanna was able to keep up in her writing very well and sometimes she wasn't, so there is no way to tell, since I was not present at the trial, how much she was actually missing when there is no cassette tape.

I transcribed everything I was given of Shanna's notes and tapes for March 3 and 4, 1986. If you have further questions, please call.

Very truly yours,

Karen L. Larsen, RPR

cc: David E. Wilson
Clerk of Court

Karen L. Larsen, RPR • Sharon M. Smith, RPR
Michelle E. Sexton, RPR • Robbie K. McCartney, RPR
Keri A. Aspelund, RPR
Peggy Prichard,RPR, CM Peggy M. Pritschy
Dolores A. Rawlins, RPR
Kathleen J. Cassity, RPR, CM

1800 SEATTLE TOWER • SEATTLE, WASHINGTON
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IN THE DISTRICT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, *Plaintiff,*

v. No. C85-87T

JEFFREY ANTOINE, *Defendant.*

FINDINGS OF FACT AND ORDER
Entered August 21, 1991

This case is before the Court on remand from the United States Circuit Court of Appeals, 906 F.2d 1379 (9th Cir. 1990). Hearings were held on July 29, 1991 to address three issues:

1. Whether the defendant can show "specific prejudice" from the lack of a complete transcript of his trial?

2. Whether the delay in receiving the trial transcript resulted in a "due process" violation?

3. Whether a "Brady" violation occurred when the statement of Clifton Thomas incriminating both the defendant and Geoffrey Terry, a trial witness, was not provided prior to sentencing?

SPECIFIC PREJUDICE

The Circuit Court set aside the defendant's conviction and remanded the case to this Court to give the defendant an opportunity to demonstrate that he was prejudiced in pursuing his appeal by the lack of a verbatim transcript. Counsel for the defendant presented the

same argument before this court as he did before the appellate court. In essence he repeated his argument for a per se rule of reversal in a situation where there is a violation of the Court Reporter Act and counsel on appeal is different from trial counsel.

This argument has already been rejected by the Circuit Court and the defendant has made no additional showing of prejudice. Therefore, the Court finds that the defendant has not met his burden of showing specific prejudice from the lack of a verbatim transcript.

DUE PROCESS

The Circuit Court conducted an exhaustive review of this issue. It has remanded to this Court to determine if the defendant has been prejudiced by the delay in receiving the trial transcript. Using the three-prong analysis in *Barker v. Wingo,* 407 U.S. 514 (1972), the Court finds that the defendant was not prejudiced by the delay.

The central issue in this analysis is whether the defendant has suffered impairment of his grounds for appeal or of his defense in the event of a retrial. As stated earlier the defendant has made no showing of prejudice to his grounds for appeal beyond those already presented to the appellate court in his argument relative to the trial transcript. Presumably because the Circuit Court did not find this sufficient to establish a due process violation as a matter law, it was referring to some additional or specific impairment of the defendant's grounds for appeal. The defendant has made no showing of specific prejudice nor has he alleged any specific prejudice. Therefore the

Court finds the defendant's grounds for appeal were not prejudiced by the delay.

Turning to the trial defense issue, a review of the proof at trial is helpful. The defendant along with two other associates entered and robbed the bank in question. During the trial, two of the bank tellers present during the robbery identified the defendant as being one of the robbers. The three robbers were seen by the Reyes brothers outside the bank and observed getting into a vehicle and driving rapidly away. The brothers wrote down the vehicle license number. It was later learned that the vehicle was registered to the defendant. At trial one of the Reyes brothers identified the defendant as the driver of that vehicle.

A neighbor, a former company commander in the U.S. Army and an Army sergeant, identified the defendant in the bank robbery photographs. Another Army associate, Geoffrey Terry, who is the focus of the *Brady* motion also identified the defendant from the bank robbery photographs.

The defendant admitted that he was in the bank at the time of the robbery to get change for a fifty dollar bill. He denied that he was involved in the robbery. This defense was presented through cross examination. The defendant did not testify.

The proof of the defendant's guilt was overwhelming. The defendant has not alleged any difficulty in presenting his defense if the case were to be retried. Further, the Court after reflecting on the trial and subsequent proceedings independently, cannot identify any impairment to the presentation of the defense case.

The defendant introduced a brief letter regarding his present mental state. It appears that the defendant is now being treated for mental problems at a Veteran's Hospital having been released from custody some time ago. The defendant was examined for mental illness and competency prior to the trial. While the continuation of this matter causes the defendant some concern, it does not appear to be the source of the defendant's present mental difficulties. In any event the Appellate court has already weighed that factor in the defendant's favor.

In the Court's view, an analysis of this case does not lead to the conclusion that the defendant's incarceration has been unjust or oppressive or that his due process rights have been violated.

BRADY ISSUE

The Court finds that the defendant was convicted on March 4, 1986. Thereafter, on March 27, 1986, an agent of the Federal Bureau of Investigation interviewed Clifton Thomas concerning several bank robberies. In this interview Thomas detailed his involvement in these robberies. In the interview Thomas and he had discussed methods of robbing bank tellers with the defendant, Reginald Barrett, and Geoffrey Terry. Two days later on August 30, 1985, Thomas and Terry robbed the First Interstate Bank using the defendant's car as the getaway vehicle.

On September 16, 1985, Thomas, Reginald Barrett, and the defendant robbed the United Bank at 8002 Pacific Avenue in Tacoma, Washington. The proceeds of the two robberies were split between Thomas, Barrett, Terry, and

the defendant. This is the bank robbery for which the defendant was convicted.

The information from the Thomas interview was not provided to the defendant until after sentencing on April 11, 1986 and therefore was not considered by the Court in sentencing.

Geoffrey Terry testified at the defendant's trial. Terry identified the defendant in a bank photograph. He also supported the defendant's theory by testifying that the defendant had told him that he (the defendant) was in the bank to get change for a fifty dollar bill when it was robbed.

The Thomas interview had not been conducted at the time of trial. Therefore, it could not have been provided to the defendant even if it was *Brady* material.

The Court views the statement as being highly inculpatory to the defendant. It does not support the theory espoused by the defendant in this hearing, that it might have been Terry in the bank instead of him. Instead it is yet another piece of damning evidence which undermines the defense theory. Indeed it shows that the defendant was involved in a series of bank robberies, including the robbery for which he was convicted, and that Terry was not present for that particular offense.

The Thomas statement is not a mitigating factor for sentencing purposes. It discloses far more criminal activity than the single robbery. Certainly the defendant would not have received a lesser sentence had the Court considered this information. The opposite is more likely to have occurred.

The Court finds that the statement was not *Brady* material and that there was no *Brady* violation.

WHEREFORE, having made these findings the defendant's conviction shall be reinstated and a new final judgment will enter.

DATED this 21st day of August, 1991.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Robert G. Chadwell
ROBERT G. CHADWELL
Assistant United States Attorney

United States Court of Appeals,
Ninth Circuit

Jeffery ANTOINE, Plaintiff-Appellant-Cross-Appellee,

v.

BYERS & ANDERSON, INC., Shanna Ruggenberg, Defendants-Appellees-Cross-Appellants.

Nos. 90-35293, 90-35362 and 90-35363.

Argued and Submitted Sept. 11, 1991.

Decided Dec. 13, 1991.

* * *

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, FARRIS and TROTT, Circuit Judges.

TROTT, Circuit Judge:

Jeffery Antoine appeals the district court's grant of summary judgment in favor of Byers & Anderson, Inc. and Shanna Ruggenberg. Antoine asserted constitutional claims for violation of due process and access to the courts plus state law claims for breach of contract as a result of Ruggenberg's failure to produce a criminal trial transcript. The district court held that Ruggenberg, a delinquent court reporter, was absolutely immune as a quasi-judicial officer. Byers & Anderson, Ruggenberg's "employer," and Ruggenberg cross-appeal from denial of summary judgment on the issue of whether Ruggenberg was an independent contractor or an employee. We affirm.

I

Byers & Anderson, a court reporting firm in Tacoma, Washington, contracted with the United States District Court for the Western District of Washington to provide court reporting services. As required by the contract, Byers & Anderson sent Shanna Ruggenberg, one of its court reporters, to provide reporting services for the district court. Ruggenberg had provided court reporting services through Byers & Anderson for approximately one and one-half years.

Ruggenberg performed full-time court reporting services for the district court from February 1986 to August 1986. While working in the district court, Ruggenberg spent business hours at the courthouse and contacted Byers & Anderson daily by telephone or in person. To satisfy the requests for overnight transcripts, excerpts of cases, verbatim reports of proceedings, and transcript requests, Ruggenberg was required to transcribe at home in the evenings and on weekends. She was unable to satisfy all of the requests and soon found herself with a backlog of work.

Ruggenberg served on March 3 and 4, 1986, as the court reporter during Jeffery Antoine's jury trial for bank robbery. Antoine appealed his conviction for this crime. Immediately following the trial, on March 20, 1986, Antoine ordered the transcript of proceedings from Ruggenberg. He made a payment of seven hundred dollars on the transcription fee because he was not aware that he could have obtained a transcript without cost due to his inability to pay.

The court ordered the transcript filed by May 29, 1986. Ruggenberg did not meet this deadline, and did not request an extension. For the next three years, Antoine attempted to obtain the transcripts through motions, court orders and hearings. The court set five subsequent filing deadlines for the transcript. Ruggenberg failed to provide the complete transcript, communicate with counsel, or comply with the orders of the court.

Ruggenberg did produce fifty-eight pages of transcript, but she was unable to locate the notes and tapes for the remainder of the proceeding. In July 1988, over two years after the initial transcript request, Ruggenberg claimed in an affidavit that she had lost the remaining notes and tapes. Subsequently, however, in April of 1989, additional notes and tapes were discovered. These items were delivered to the district court, and a substitute reporter attempted to reconstruct the record pursuant to Fed.R.App.P. 10(c).[1] The substitute reporter was unable to complete a full transcript of the criminal proceeding because the notes alone were insufficient to produce an

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[1] Fed.R.App.P. 10(c) provides: *"Statement on the Evidence of Proceedings When No Report Was Made or When the Transcript is Unavailable.* If no report of the evidence or proceedings at a hearing or trial was made,or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 30 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal."

adequate transcript. The reconstructed transcript was deficient in that it included no charge to the jury, no transcript of the sentencing, inaudible words or phrases, garbled testimony, and insufficient identification of speakers.

As a result of his delay in obtaining the partial transcript, Antoine's criminal appeal did not proceed to argument until four years after his conviction. In the underlying criminal action, this court vacated his conviction and remanded. We instructed the district court to determine whether Antoine was prejudiced by his lack of a complete transcript, and whether the delay in obtaining his transcript impaired his defense on retrial. *See United States v. Antoine*, 906 F.2d 1379, 1384 (9th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 398, 112 L.Ed.2d 407 (1990). The present status of Antoine's criminal case is unknown.

Antoine filed the present action pursuant to 42 U.S.C. § 1983 (1988). The district court granted Byers & Anderson's and Ruggenberg's motions for summary judgment, holding that Ruggenberg's acts were within her official capacity as a quasi-judicial officer. Summary judgment was denied on Byers & Anderson's assertion that Ruggenberg was an independent contractor and not its employee. The court dismissed Antoine's federal claims and dismissed without prejudice his pendent state law claims.

II

A federal agent acting under authority of purely federal law cannot be held liable under Section 1983.[2] *Scott v. Rosenberg*, 702 F.2d 1263, 1269 (9th Cir.1983), *cert. denied*, 465 U.S. 1078, 104 S.Ct. 1439 79 L.Ed.2d 760 (1984). Because Ruggenberg was a federal, not state, agent, and because Antoine filed his action pursuant to 42 U.S.C. § 1983, we must first determine whether the district court had jurisdiction to adjudicate his claim. Antoine apparently recognized the problem and sought to amend his complaint to set forth the jurisdictional basis as 28 U.S.C. § 1331 (1988), but the claims were dismissed before the amendment became effective. The district court's summary judgment order disposed of the case as if it were a Section 1983 action.

On Appeal, Antoine characterizes his suit as a *Bivens* action. *See* 26 U.S.C. § 1331; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). We follow *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385 (9th Cir.1987), *cert. denied*, 486 U.S. 1040, 108 S.Ct. 2031, 100 L.Ed.2d 616 (1988), and ignore Antoine's initial mischaracterization. In *Mullis*, the action against federal agents was filed as a

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[2] 42 U.S.C. § 1983 (1988) provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1983 action instead of as a federal question case. On appeal, this court ignored Mullis' mischaracterization and found jurisdiction in the district court under 28 U.S.C. § 1331. *Mullis*, 828 F.2d at 1387 n. 7. Because immunity in *Bivens* actions is coextensive with immunities recognized in Section 1983 cases, our decision is unaffected by the jurisdictional basis.[3] *See, e.g. Harlow v. Fitzgerald*, 457 U.S. 800, 818 n. 30, 102 S.Ct. 2727, 2738 n. 30, 73 L.Ed.2d 396 (1982); *Butz v. Economou*, 438 U.S. 478, 504, 98 S.Ct. 2894, 2909-10, 57 L.Ed.2d 895 (1978); *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir.1989). We conclude we have jurisdiction to hear this appeal.

III

A

We review de novo the district court's grant of summary judgment. *Price v. Hawaii*, 939 F.2d 702, 706 (9th Cir.1991). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 867 (9th Cir.1991). Issues of immunity are reviewed de novo. *Doe v. Atty. Gen. of the United States*, 941 F.2d 780, 783 (9th Cir. 1991).

[3] No immunity is expressly provided for in an action brought pursuant to Section 1983. However, Section 1983 was not meant to "abolish wholesale all common-law immunities." *[illegible] v. Reed*, ___ U.S. ___, 111 S.Ct. 1934, 1938, 114 L.Ed.2d 547 (1991) (quotation omitted). Instead, "this section is to be read "in harmony with general principles of tort immunities and defenses rather than in derogation of them.' " *Id.* (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418, 96 S.Ct. 984, 989, 47 L.Ed.2d 126 (1976)). A similar analysis is applicable to *Bivens* actions.

B

Antoine argues that court reporters are not, as a matter of law, entitled to the protection of absolute quasi-judicial immunity. We disagree.

In *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872), the Supreme Court confirmed the common law principle that judges have absolute immunity for acts committed within their judicial jurisdiction. The Court described the principle as follows:

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.
>
> The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the

> settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.

Bradley, 80 U.S. (13 Wall.) at 347 (citation omitted).

In elaborating this principle, the Court stated the following with respect to the record of a lawsuit:

> If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party – and that judge perhaps one of an inferior jurisdiction – that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amendable by the losing party.

Id. at 349.

Judicial immunity is not limited to judges. It extends to other government officials who play an integral part in the implementation of the judicial function. Such officials enjoy derivative immunity (quasi-judicial immunity) which can be absolute if their conduct relates to a core judicial function. *See Mullis*, 828 F.2d at 1388-91 (bankruptcy judge, court clerk, and bankruptcy trustee covered by absolute immunity); *Sharma v. Stevas*, 790 F.2d 1496, 1496 (9th Cir.1986) (clerk of the United States Supreme

Court has absolute quasi-judicial immunity because the activities are integral to the judicial process); *Stewart v. Minnick*, 409 F.2d 826, 826 (9th Cir.1969) (court reporters are quasi-judicial officers with regard to acts performed in their designated capacities).

With the decision of the Supreme Court in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 565 (1988), the analysis of what judicial activities are entitled to quasi-judicial immunity was significantly refined. *Forrester* and subsequent cases confirm that a claim of immunity must be analyzed using a "functional" approach. *See, e.g., Burns*, 111 S.Ct. at 1939; *Forrester*, 484 U.S. at 224, 108 S.Ct. at 542-43; *Westfall v. Erwin*, 484 U.S. 292, 296 n. 3, 108 S.Ct. 580, 583 n. 3, 98 L.Ed.2d 619 (1988). "[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester*, 484 U.S. at 227, 108 S.Ct. at 544 (emphasis added).

In *Forrester*, the Supreme Court limited absolute judicial immunity to actions that are either "judicial or adjudicative." *Id.* at 229, 108 S.Ct. at 545. By contrast, the *administrative* act of a judge in discharging a court employee was held not to be entitled to the protection of absolute immunity because this function was outside the realm of purely judicial activity. *Id.* The Court decided that although employment and other administrative decisions are crucial to the efficient operation of the judicial system, a judge's performance of these tasks does not bring them within the realm of judicial jurisdiction or make them adjudicative. *Id.* at 230, 108 S.Ct. at 545-46. The Court noted that absolute immunity is designed to facilitate independent and impartial adjudication, *id.* at 227, 108 S.Ct. at 544, but is not meant to insulate judicial

officials from all liability for their actions, *id.* at 223, 108 S.Ct. at 642.

Ruggenberg can only receive absolute quasi-judicial immunity if her court reporting activities are part of the adjudicatory function. We conclude that they re.

28 U.S.C. § 753 (1988), known as the Court Reporter Act, gives us the answer to this inquiry. It reads, in relevant part, as follows:

> (b) Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. . . . Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule of order of court as may be requested by any party to the proceeding.
>
> The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

> The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefore, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.
>
> The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.
>
> The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcript of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

28 U.S.C. § 753(b).

There can be no doubt that the making of the official record of a court proceeding by a court reporter is part of the judicial function. That process is inextricably intertwined with the adjudication of claims. The official record reflects evidence taken in the case, the arguments and objections of attorneys, and the ruling of the court. The function of the official record is indispensable to the appellate process. Thus, because the tasks performed by a court reporter in furtherance of her statutory duties are functionally part and parcel of the judicial process, these actions are entitled to absolute quasi-judicial immunity. In this regard, *Mullis* and *Stewart* are unaffected by *Forrester.*[4] Ruggenberg, as a court reporter, is therefore entitled to absolute quasi-judicial immunity for actions within the scope of her authority.

C.

We must next determine whether Ruggenberg acted within the scope of her authority in failing to produce Antoine's trial transcript. Absolute immunity will not attach to judicial officers when they act "clearly and completely outside the scope of their jurisdiction." *Demoran v. Witt*, 781 F.2d 155, 158 (9th Cir.1986) (citation

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[4] We reject the Eighth Circuit's reasoning in *McLallen v. Henderson*, 492 F.2d 1298 (8th Cir. 1974). In *McLallen*, the duties of a court reporter were held to the ministerial, not discretionary, and thus were not protected by quasi-judicial immunity. *McLallen*, 492 F.2d at 1299-1300. *McLallen*, decided before *Forrester*, fails to consider the judicial function performed by the court reporter, and focuses on the discretion of the actor. We reject this approach and choose instead to focus on the nature of the function performed by the court reporter.

omitted). In *Mullis*, the court determined that quasi-judicial immunity would attach if the acts complained of were "within the general 'subject matter jurisdiction' of the [quasi-judicial officer] . . . " *Mullis*, 828 F.2d at 1990 (citation omitted). "Jurisdiction should be broadly construed to effectuate the policies supporting immunity." *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir.1986).

The Court Reporter Act requires Ruggenberg to transcribe criminal proceedings. "The reporter . . . designated to produce the record *shall* transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court. . . . " 28 U.S.C. § 753(b) (emphasis added). Ruggenberg was not clearly outside of her jurisdiction in failing to complete the transcript. "Whether an act is judicial 'relate[s] to the nature of the act itself. . . .' " *Ashelman*, 793 F.2d at 1075 (quoting *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 1107, 55 L.Ed.2d 331 (1978)). Although Ruggenberg failed to comply with the statute or court orders, Antoine has not shown any action that was not within her responsibilities as a court reporter.

Thus, Ruggenberg is entitled to absolute quasi-judicial immunity despite the impact on Antoine's criminal appeal due to her failure to timely prepare the transcript. "judicial immunity applies 'however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.' " *Id.* at 1075 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1872)).

Antoine argues that Ruggenberg's acceptance of the seven hundred dollar payment from him constitutes theft

that would preclude absolute immunity from attaching. We disagree. The acceptance of a fee for transcribing the proceedings, although not thereafter earned, is within the jurisdiction of a court reporter and does not preclude absolute immunity. *See New Alaska Development Corp. v. Guetschow,* 869 F.2d 1298, 1304 (9th Cir.1989) (malice *or* corrupt motive insufficient to deprive a judge of absolute immunity; focus on whether the precise act is a normal judicial function).

D

A party aggrieved by the complete failure of the court reporter to discharge her responsibilities does have remedies. A trial transcript may be reconstructed pursuant to Fed.R.App.P. 10(c), and the Court of Appeals has authority to accord whatever relief might be appropriate pursuant to Fed.R.App.P. 11(b). A district court in the first instance has the power to compel the production of a transcript in the event of a simple delinquency. The final remedy would be to vacate a judgment and remand for a new trial because appellate review was not possible. *See United States v. Anzalone,* 886 F.2d 229, 232 (9th Cir.1989); *United States v. Piascik,* 559 F.2d 545, 547 (9th Cir.1977), *cert. denied,* 434 U.S. 1062, 98 S.Ct. 1235, 55 L.Ed.2d 762 (1978).

The district court did not err in its analysis of alternative remedies. Antoine's criminal appeal was remanded for a finding of whether prejudice had occurred. This was an appropriate remedy under the circumstances of the case. Alternative remedies are available to the private litigant "and to those remedies they must, in such cases,

resort." *Forrester,* 484 U.S. at 228, 108 S.Ct. at 544 (quotation omitted).

E

Because Ruggenberg is entitled to absolute quasi-judicial immunity, the district court correctly determined that Byers & Anderson is likewise not liable to Antoine. This is so regardless of Ruggenberg's employment relation with Byers & Anderson.

IV

Because we find that Ruggenberg was entitled to absolute quasi-judicial immunity, we need not reach the cross-appeals on the denial of summary judgment.

V

Ruggenberg's actions as a court reporter meet the criteria for the application of the doctrine of absolute quasi-judicial immunity. The function of a court reporter is integral to the efficient operation of the judicial system and, as such, is entitled to derivative judicial immunity. Otherwise, unsuccessful litigants could bring suit against the court reporter in their efforts to redress a perceived wrong. This threat of prospective litigation would hinder the efficient and accurate transcription of judicial proceedings. The district court was correct in holding that Ruggenberg was entitled to absolute quasi-judicial immunity and therefore granting summary judgment.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff Appellee,*

v. No. 91-30321

JEFFERY ANTOINE, *Defendant-Appellant.*

OPINION:
Before: Chief Judge Wallace
Circuit Judges Hall and Wiggins
Filed June 25, 1992

Antoine appeals from the reentry of his judgment of conviction. The district court order denied relief following our remand in *United States v. Antoine*, 906 F.2d 1379 (9th Cir.) (Antoine I), *cert. denied*, 111 S. Ct. 398 (1990). The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

In Antoine I, we affirmed in part, vacated the judgment, and remanded to the district court to consider three issues: (1) whether Antoine can show specific prejudice arising from his lack of a complete trial transcript; (2) whether, under his due process claim, Antoine can demonstrate that in the event of a retrial, his defense will be impaired as a result [*2] of the delay; and (3) whether Antoine has stated a valid claim under *Brady v. Maryland*, 373 U.S. 83 (1963). *Antoine I*, 906 F.2d at 1384. Antoine also appeals from the district court's denial of his motion to hire a psychological expert to determine the extent of his anxiety resulting from the delay of his appeal. This issue was decided in *Antoine I*, *Id.* at 1381-82, and was not an issue on remand. Therefore, we will not address it.

We review the district court's findings of fact for clear error. *United States v. McConney*, 728 F.2d 1195, 1200-01 (9th cir.) (en banc) (McConney), *cert. denied*, 469 U.S. 824 (1984). However, we review mixed questions of law and fact de novo. *Id.*

The district court found that Antoine presented no facts showing specific prejudice. Antoine repeats his argument, unsuccessfully presented in Antoine I, that a violation of the *Court Reporter Act*, 28 U.S.C. § 753(b), coupled with a change of counsel on appeal, requires reversal. Antoine may not relitigate this issue.

Antoine contends that his due process rights were violated as a result [*3] of delay in his appeal. The district court disagreed, finding that Antoine proved no prejudice as a result of the delay. We review this mixed question of law and fact de novo. *McConney*, 728 F.2d at 1202.

In Antoine I, we decided that Antoine could not establish a due process violation absent a showing of prejudice. 906 F.2d at 1382. The prejudice prong requires analysis of three categories of potential prejudice stemming from a delayed appeal: (1) oppressive incarceration pending appeal; (2) anxiety and concern of the convicted party awaiting the outcome of the appeal, and (3) impairment of the convicted person's grounds for appeal or of the viability of his defense in case of retrial. *Id.* We remanded to the district court for factual findings related to the third category. *Id.* at 1383.

The district court reviewed the "overwhelming" proof of guilt presented at trial and found that Antoine was not prejudiced by the delay. Numerous witnesses identified Antoine as one of the bank robbers, as well as

the driver of the escape vehicle, which was registered in his name. Antoine's trial defense was presented almost [*4] entirely through cross-examination of prosecution witnesses. His case-in-chief consisted of recalling one government eyewitness. He argued that he was present in the bank at the time of the robbery, but that he did not participate. Given the evidence against Antoine, and the fact that his defense was based entirely upon a claim that the government had presented insufficient evidence to carry its burden of proof, we agree with the district court that Antoine has not shown that his ability to present a defense in the event of a retrial was prejudiced by the delay.

Antoine has presented no relevant factual argument showing that he was prejudiced by the delay in his appeal. Instead, he relies upon the presumed prejudice arising from his lack of a complete transcript. We have already rejected that argument. In addition, Antoine relies upon the government's alleged violation of Brady as a source of prejudice. Even if this could be considered under Antoine's prejudice argument, it would also be insufficient, as discussed below.

We conclude that the district court properly determined that Antoine suffered no impairment of his grounds for appeal or of his defense in the event[*5] of a retrial.

Antoine argues that the district court erred in concluding that the government did not violate Brady by failing to supply him with information regarding a government witness that would have been material to his

cross-examination. We review de novo Antoine's challenge to his conviction on the basis of Brady. *United States v. Marashi*, 913 F.2d 724, 731 (9th Cir. 1990).

On remand, the district court properly found that the alleged Brady material was not obtained until after Antoine was convicted. The information in question was obtained by the prosecution during an interview with Clifton Thomas, on March 27, 1986. Thomas stated that he, Antoine, and another person conducted the bank robbery at issue in this case. Antoine was convicted more than three weeks prior to this interview, however, on March 4, 1986. Therefore, no Brady violation could have occurred because the allegedly exculpatory information was not in the possession of the government until after trial.

Antoine also argues that the information should have been disclosed, at a minimum, prior to sentencing on April 11, 1986. The district court found that the evidence [*6] implicated Antoine in a series of bank robberies, and that had it been available at sentencing, the court would not have considered it to be a mitigating factor. On the contrary, the district court stated that the evidence would likely have had an opposite effect.

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 91-7604

Jeffery Antoine,

Petitioner

v.

Byers & Anderson, Inc., et al.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 13, 1992